

The Constitutionality of Negotiated Criminal Judgments in Germany

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A. Introduction

In a long-awaited judgment, the German Constitutional Court in 2013 upheld the constitutionality of the 2009 German law authorizing the negotiation of criminal judgments between the court and the parties. The German version of plea bargaining,¹ which had grown from the grassroots of criminal law practice, was later accepted by the Federal Court of Justice² and written into § 257c of the Code of Criminal Procedure (StPO) in 2009. In light of these developments, a verdict of unconstitutionality by the Federal Constitutional Court was the final hope of those who opposed the replacement of the search for truth with a system of negotiation. The Court deflated these hopes, but at the same time refrained from giving an unconditional stamp of approval to the burgeoning practice of negotiating judgments. The Court attempted to rein in that practice by giving the statute a literal reading, emphasizing the limitations it places on negotiations, and strictly prohibiting any consensual disposition outside the statutory framework.

This is probably the most that critics of the bargaining system could realistically have expected. After decades of negotiating judgments, the German system of criminal justice has become so dependent on the practice that an outright ban would have had unforeseeable and unmanageable consequences. Although the German version of plea bargaining has remained controversial among academics, high court judges, and defense

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¹ The term “plea bargaining” is not a perfect translation for the consensual resolution of criminal cases in Germany, because the notion of a “plea” is alien to German criminal procedure. In German, the terms *Verständigung* (“understanding”) and *Absprachen* (“bargains”) are used most frequently for negotiations and agreements on the outcome of the criminal process. Because plea bargaining is the term most familiar to Anglo-American lawyers, we sometimes use it in this article when we refer to procedures by which defendants receive concessions in exchange for confessing to a crime.

² Bundesgerichtshof [BGH - Federal Court of Justice], Case No. 4 StR 240/97, 43 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 195, para. 8 (Aug. 28, 1997), <http://www.hrr-strafrecht.de/hrr/4/97/4-240-97.php3?referer=db>.

lawyers,³ the practice has become so entrenched that a verdict of unconstitutionality might well have led to an open rebellion by lower court judges and practitioners, which in turn would have called into question the authority of the Federal Constitutional Court.

Given these constraints, the Court deserves praise for attempting to regulate and limit the practice of negotiated judgments. This is especially true if one compares the efforts of the Federal Constitutional Court to the hands-off approach of the United States Supreme Court with respect to plea bargaining (see section G. below). The German Court emphasized that the search for truth, the proportionality of punishment, and transparency of negotiations are important values in criminal justice and that they must be respected even in the context of plea bargaining.⁴ The Court also attempted to retain control over the enforcement of its judgment by indicating that it may need to revisit the legislation's constitutionality if courts, prosecutors, and defense attorneys continue to ignore the statutory provisions as interpreted by the Court.⁵ In short, the Court placed the system of negotiating judgments on probation.

One may wonder, however, whether the Court concentrated its efforts on the most relevant questions. In its judgment, the Court bypassed the more fundamental issues that a system of plea bargaining raises in the context of German criminal justice. The Court also failed to sufficiently consider the practical effects of its ruling on everyday negotiations in German courts. Finally, the Court was probably too optimistic in assuming that it is possible to make practitioners abide by a set of technical rules created by judicial fiat for a practice that is basically built upon the consent of the parties and judges.

³ In submissions to the Court, the German government as well as organizations of prosecutors and defense lawyers argued that the practice was constitutional and beneficial. But one influential association of defense lawyers (*Deutscher Anwaltverein*) and some high court judges voiced strong criticism of the practice. Among serious scholars, critics are in the majority. See, e.g., Gunnar Duttge, *Möglichkeiten eines Konsensualprozesses nach deutschem Strafprozessrecht*, 115 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 539 (2003); Uwe Murmann, *Reform ohne Wiederkehr? Die gesetzliche Regelung der Absprachen im Strafverfahren*, 10 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 526 (2009); THOMAS RÖNNAU, *DIE ABSPRACHE IM STRAFPROZESS* (1990); Bernd Schünemann, *Die Absprachen im Strafverfahren*, in Festschrift für Peter Riess 525 (Ernst-Walter Hanack et al. eds., 2002); Carl-Friedrich Stuckenberg, § 257c *Marginal Notes 1–19*, in LÖWE/ROSENBERG: *DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ* (Volker Erb et al. eds., 26th ed. 2013); Edda Weßlau, *Absprachen in Strafverfahren*, 116 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 150 (2004).

⁴ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11, 2013 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1058, paras. 67, 95–96, 104–05 (Mar. 19, 2013) [hereinafter *Judgment of Mar. 19, 2013*].

⁵ *Id.* para. 121.

B. A Brief History of Plea Bargaining in Germany

As recently as in 1979, American comparative law scholar John Langbein called Germany a “land without plea bargaining,”⁶ holding up the German system as a shining example for Americans on how to deal efficiently with criminal cases without resorting to unseemly bartering in court. Although German practice might, even in the 1970s, not quite have lived up to the image presented by Langbein,⁷ unofficial shortcuts to justice were used much less frequently than in the United States and were in any event kept strictly secret. There is a structural reason for that difference: For the simple cases that make up the bulk of the caseload resolved through guilty pleas in the United States, the German system provides for relatively straightforward trial procedures that obviate the need for detours through out-of-court negotiations. The basis for the trial is established in a comprehensive pretrial investigation, the steps of which are recorded in a dossier that can be read not only by the trial court but also by the defense lawyer.⁸ The pretrial investigation is conducted by the prosecutor and the police, and it is supposed to be impartial in that exonerating evidence must also be gathered and considered.⁹ At trial, the presiding judge directs the taking of evidence and interrogates witnesses in an inquisitorial fashion.¹⁰ There is no jury and thus no need for complicated rules on admissibility of evidence and jury instructions.¹¹

In the 1970s and again in the 1990s, the German system faced rising caseloads. Yet the reaction of the legislature was not to introduce plea bargaining, but instead to turn some minor crimes into mere administrative violations that could be disposed of without trial.¹² More importantly, the legislature broadened the discretion of prosecutors to dismiss non-felony cases without trial, typically in exchange for a payment to be made by the suspect

⁶ John Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204 (1979).

⁷ See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 567–69 (1997) (contesting the argument that German criminal trials are more efficient, at least as concerns trials in the 1990s).

⁸ See STRAFPROZESSORDNUNG [STPO][CODE OF CRIMINAL PROCEDURE], Feb. 1, 1877, REICHSGESETZBLATT [RGL.] 253, as amended, § 147.

⁹ See *id.* § 160, para. 2.

¹⁰ See *id.* § 238, para. 1. The parties retain the right to ask questions of witnesses and expert witnesses. *Id.* § 240, para. 2.

¹¹ Lay judges, to the extent they participate at all, sit and deliberate together with professional judges. GERICHTSVERFASSUNGSGESETZ [GVG][JUDICATURE ACT], Jan. 27, 1877, REICHSGESETZBLATT [RGL.] 41, as amended, § 30.

¹² For example, many road traffic violations have been decriminalized and can be sanctioned by fines through an administrative process. See John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 452 (1974).

to the state or to a charitable organization.¹³ Another frequently used tool for dealing with non-serious cases is the penal order (*Strafbefehl*), a written proceeding in which the judge imposes a sentence (a fine or a suspended prison sentence of up to one year) upon written application of the prosecutor. A (simplified) trial is held only if the defendant appeals the penal order.¹⁴

In the common law world, some similar shortcuts to resolving non-serious cases may exist, but they have been overshadowed by the ubiquitous practice of plea bargaining. Why, then, did Germany not similarly resort to plea bargaining, that is, conviction and sentence based on the defendant's simple declaration of guilt? One might be inclined to think that basic procedural principles such as the presumption of innocence, the right to a public trial before an independent tribunal, and the privilege against self-incrimination would stand in the way of adopting such a practice. But as is well known, the same principles apply in Great Britain and the United States, and they have not inhibited the development of plea bargaining in these jurisdictions. Both in common law countries and in Germany, the defendant can voluntarily waive all his procedural rights, which might open the door to conviction based merely on his consent.¹⁵

But in Germany, two other basic principles have long stood in the way of anything resembling plea bargaining: The inquisitorial principle and the principle that the court's verdict and sentence must reflect the defendant's blameworthiness (often called the *Schuldprinzip* or "guilt" principle). Under the inquisitorial principle, German judges have a duty to investigate the material truth in a criminal case.¹⁶ German judges also have at their disposal the tools to investigate independently, that is, regardless of any offers of evidence or motions of the parties. Judges receive, even before trial, the investigative file containing

¹³ See StPO §§ 153, 153a. Even where the suspect makes a payment—the amount of which is set by the prosecutor without an absolute statutory limit—that does not legally imply a confession of guilt, and the presumption of innocence in favor of the suspect remains unaffected. *Id.*

¹⁴ See StPO §§ 407 et seq. In recent years, more offenders have been convicted by penal order than by regular trial. In 2012, German prosecutors dealt with approximately 4.5 million cases with known suspects. Around 77% of these cases were dismissed for lack of sufficient evidence or for policy reasons. Of the remaining cases, 52% were disposed of by penal order, and in 48% an indictment was filed. See *Staatsanwaltschaften - Fachserie 10 Reihe 2.6*, STATISTISCHES BUNDESAMT, 2012, available at: <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften.html>.

¹⁵ *Brady v. United States*, 397 U.S. 742, 748–49 (1970). Although the Supreme Court has not imposed any significant constitutional constraints on plea bargaining, a number of American legal scholars have argued that such constraints are both possible and necessary. *E.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial*, 50 U. CHI. L. REV. 931, 963 (1983); Russell D. Covey, *Plea Bargaining After Lafler and Frye*, 51 DUQ. L. REV. 595, 597, 599–600 (2013); Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709, 723–31 (2013).

¹⁶ See StPO § 244, para. 2.

all the evidence gathered by the police and the prosecution. At trial, the presiding judge conducts the investigation by calling and questioning witnesses, summoning experts, reading documents, and examining real evidence. Since the inquisitorial principle is deemed paramount and the verdict must have a firm basis in the material truth established by the court through its own fact-finding,¹⁷ the German system does not accept the idea that a formal declaration of guilt by the defendant could be a sufficient basis for the court's finding of guilt.¹⁸ Even a full confession made by the defendant in open court does not necessarily relieve the court of the duty to "discover the truth."¹⁹ Nor can the parties' stipulations of fact bind the court; the judge remains obliged to find out what really happened. The court's duty to examine the facts independently thus precludes any effective fact bargaining.

The court's duty to search for the truth is related to the second important principle involved here, the proportional correlation between the offender's blameworthiness and the sanction imposed on him (*Schuldprinzip*). According to the *Schuldprinzip*, an offender's sentence "may not depart—not even downward—from its purpose to provide just punishment commensurate with culpability."²⁰ This principle, which is based on the guarantee of human dignity and personal liberty²¹ and on the principle of the rule of law,²² has been accorded constitutional status.²³ Although the principle of proportionality between guilt and punishment pertains to substantive criminal law, it has procedural implications: It obliges the court to find the facts necessary to establish the level of the defendant's guilt. Moreover, if a sentence is reduced merely in order to expedite proceedings and reduce caseload pressures, and therefore remains below the level that would reflect the defendant's blameworthiness, imposition of that sentence violates the guilt principle. The same is true in the even more problematic case where the court increases the sentence of a defendant who rejected a "deal" and insisted on a full trial.

In spite of these serious constitutional obstacles, negotiated justice somehow crept into the German system of criminal justice. The precise causes for this are not clear. Most likely,

¹⁷ See StPO § 261 (requiring the court to base its conclusion exclusively on the evidence taken at the trial).

¹⁸ BGH, Case No. 4 StR 240/97 at para. 26.

¹⁹ Thomas Weigend, *The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure*, in *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT* 39, 44 (John Jackson et al. eds., 2008).

²⁰ *Judgment of Mar. 19, 2013* at paras. 53–54 (translating done by authors).

²¹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl., arts. 1(1), 2(1).

²² *Id.* art. 20(3).

²³ *Judgment of Mar. 19, 2013* paras. 53–54.

a number of factors came together to facilitate the acceptance of negotiated judgments. In its judgment, the Federal Constitutional Court referred to several of these causes.²⁴

One relevant factor was an increase in “sophisticated” crime, especially white-collar offenses, often with an international dimension.²⁵ The prosecution and trial of such cases have required much greater investigative resources than street crime prosecutions and have presented complex factual issues that could not be resolved in a one-day trial. Proceedings in white-collar crime cases have demanded a broad evidentiary record, including expert witness testimony and often investigations of transnational conduct.²⁶ Additionally, as the number of white-collar crime cases in German courtrooms grew, there also came a new generation of defense lawyers who were well-paid, well-trained, and ready to stretch to the limits the possibilities offered by the StPO. These lawyers quickly discovered opportunities for delaying and protracting the trial process, for example, by repeatedly requesting the taking of additional evidence or by filing multiple motions to disqualify judges for alleged bias.²⁷ Moreover, the German trial system, based on the principles of immediacy (all evidence must be presented and discussed in court) and orality (even written documents must be read out loud at the trial), proved ill-equipped to deal with complex cases of business crime, where evidence often involved high numbers of written documents or data files. An emphasis on human rights, fueled by the ambitious jurisprudence of the European Court of Human Rights, also led to an increase in disputes regarding the admissibility of evidence and thus added even more potential obstacles to a streamlined process.

Taken together, these developments put the German trial system under heavy pressure, especially since the German states refused to expand the staff and financial resources in line with the growing demands on the system.²⁸ Under a system of quantitative

²⁴ See *id.* para. 3.

²⁵ The increase of white-collar crime cases was partly caused by an expansion of criminal legislation covering conduct that had theretofore not been prohibited at all or had been regulated by administrative law. Cf. Rainer Hamm, *Wie muss das Strafrecht beschaffen sein, damit wir uns wieder ein Legalitätsprinzip leisten können?*, in *PROZESSUALES DENKEN ALS INNOVATIONSANREIZ FÜR DAS MATERIELLE STRAFRECHT 1* (Mark Pieth & Kurt Seelmann eds., 2006); Hans Theile, *Strafrechtliche Hypertrophie und ihre Folgen*, 93 *MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM* 147, 149–50 (2010).

²⁶ See *Judgment of Mar. 19, 2013* at para. 3. The relationship between the complexity of white-collar crime prosecution and the greater need for plea bargaining has been noted in the American context as well. See, e.g., Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 *VA. L. REV.* (forthcoming 2014).

²⁷ See *Judgment of Mar. 19, 2013* at para. 3; Ernst-Walter Hanack, *Vereinbarungen im Strafprozeß, ein besseres Mittel zur Bewältigung von Großverfahren?*, 7 *STRAFVERTEIDIGER [StV]* 500 (1987); Volker Krey & Oliver Windgätter, *The Untenable Situation of German Criminal Law: Against Quantitative Overloading, Qualitative Overcharging, and the Overexpansion of Criminal Justice*, 13 *GERMAN L.J.* 579, 586–92 (2012).

²⁸ Both the number of cases brought before the courts and the number of prosecutors and judges have remained at about the same level for the last fifteen years. See *Justizgeschäftsstatistik: Geschäftsentwicklung bei Gerichten*

benchmarks of performance, prosecutors and judges felt impelled to process more complex cases in less time.²⁹ In this environment, negotiated judgments presented a welcome respite to courts and practitioners since they offered a shortcut through the cumbersome trial procedure, allowed the courts to resolve more cases in less time, eased their caseload, and increased their quantitative output.³⁰

Practitioners and judges thus began to settle criminal cases informally, despite the lack of legislative authorization. Negotiations were typically initiated by defense lawyers or by the judges themselves, who would approach the defense lawyers and suggest a backroom conference. If negotiations progressed smoothly, the presiding judge typically offered a defined, relatively lenient sentence or sentence range in exchange for the defendant's confession or the defense's agreement to abandon further evidentiary motions. The prosecutor would normally not be an active party to the deal-making but held an informal veto power because he could choose to appeal the negotiated judgment.³¹ Initially, most of these deals were reached informally and off-the-record. A waiver of appeal by all parties was normally part of the agreement, and oversight by higher courts was therefore spotty or non-existent.³² But occasionally, informal agreements were ambiguous or were misunderstood, fell apart, or otherwise prejudiced the interests of the prosecution or the defense, and thus became subject to appellate review. The German courts of appeal hence gradually developed case law on the matter.

und Staatsanwaltschaften seit 1995, STATISTISCHES BUNDESAMT, Dec. 2012, at 21, available at https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/GeschaeftsentwicklungGerichtStaatsanwaltPDF_5242001.pdf?__blob=publicationFile; *Ausgewählte Zahlen für die Rechtspflege* STATISTISCHES BUNDESAMT, 2012, at 15, available at <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/Querschnitt/RechtspflegeAusgewaehlteZahlen.html>; but cf. Regina E. Rauxloh, *Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?*, 34 FORDHAM INT'L L.J. 296, 298–99 (2011) (stating that the duration and complexity of proceedings have likely increased).

²⁹ See *Judgment of Mar. 19, 2013* at para. 41 (suggesting, without providing a reference, that quantitative measures of performance for judges has pushed them to dispose of cases more efficiently); see also Shawn Boyne, *Is the Journey From the In-Box to the Out-Box a Straight Line? The Drive for Efficiency and the Prosecution of Low-Level Criminality in Germany*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 37, 46–47, 53 (Erik Luna & Marianne Wade eds., 2012) (noting that over the last two decades, supervisors have relied increasingly on case-processing statistics to measure prosecutorial performance and that this has forced prosecutors to work more efficiently).

³⁰ See Carl-Friedrich Stuckenberg, *Zur Verfassungsmäßigkeit der Verständigung im Strafverfahren*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 212, 214 (2013); see also Brown, *supra* note 26, at 27 (describing the allure of measurable outputs such as case dispositions, as opposed to criminal justice values that cannot be measured, such as democratic participation and due process).

³¹ Under German law, the prosecution can challenge the sentence on appeal. See StPO § 296, para. 1.

³² Rauxloh, *supra* note 29, at 316.

C. Judicial and Legislative Regulation of Plea Bargaining

An early pronouncement of principles was issued by a three-judge chamber of the Federal Constitutional Court in 1987. Faced with a constitutional challenge to a “normal” deal without special features or defects, the Chamber held that negotiated judgments are not unconstitutional as long as certain principles are respected. These principles include a full investigation of the facts by the court, a verdict based upon these facts and the law, and proportionality between the punishment and the defendant’s culpability.³³

In 1997, the Federal Court of Justice (*Bundesgerichtshof* or BGH)³⁴ issued a judgment purporting to define certain ground rules for the practice of negotiating judgments, which by then had spread widely and had given rise to extensive debate among practitioners and legal scholars.³⁵ At the outset, the Court acknowledged that German criminal procedure is “fundamentally inimical to settlements.”³⁶ But the Court nonetheless concluded that negotiated justice could be made compatible with existing law as long as certain principles were followed.

These principles included: The obligation of the trial court to find the facts necessary for its judgment, even if the defendant makes a confession; the prohibition against putting undue pressure on the defendant to make a confession; the proportionality of guilt and sentence; the requirement of disclosing in open court any negotiations that had taken place in chambers; and the participation of all judges (including the lay judges) and parties (including the defendant) in the negotiating process. The Court further demanded that the trial judge refrain from promising a particular sentence (he could only indicate a sentence range) and prohibited the advance waiver of the right to appeal. Where an agreement had been reached, the trial court was precluded from deviating from the promised sentence range unless “grave new circumstances” appeared.³⁷

³³ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1133/86, 1987 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2662 (Jan. 27 1987), <http://dejure.org/dienste/vernetzung/rechtsprechung?Text=2+BvR+1133/86>.

³⁴ The Federal Court of Justice is the highest court of appeals for criminal cases. Defendants can, however, challenge the BGH’s decisions on constitutional grounds by filing a complaint with the Federal Constitutional Court.

³⁵ See BGH, Case No. 4 StR 240/97; STEPHEN THAMAN, COMPARATIVE CRIMINAL PROCEDURE, 145–50 (2002) (translating and publishing the decision in English).

³⁶ THAMAN, *supra* note 35, at 145.

³⁷ *Id.* at 149–50. The Court elaborated: “Such circumstances could, for instance, be that the act turns out to be a felony instead of a less serious offense due to new facts or evidence . . . or that serious prior convictions of the defendant were unknown.” *Id.* at 150.

These rules were seen as a reasonable basis for the practice of negotiated judgments, but they also provoked criticism,³⁸ and it is not quite clear to what extent lower courts actually followed them. In 2005, the Grand Chamber of the Federal Court of Justice, in another judgment, urged the legislature to take action and promulgate statutory guidelines for bargaining,³⁹ in line with the German emphasis on statutory rather than judicial decision-making on issues of importance.⁴⁰

Heeding the court's call, the German legislature in 2009 passed a law amending the StPO to authorize plea bargaining.⁴¹ The legislation expressly authorizes "discussions" about a case "with a view toward expediting the proceedings."⁴² In its central new provision, § 257c StPO, the law allows judges to reach an "understanding" with the parties about the outcome of the case. Section 257c of the StPO reads as follows:

(1) In accordance with the following paragraphs, the court may in suitable cases come to an understanding with the participants of the proceedings on how to proceed further and on the result of the process. Section 244 para. 2 [Code of Criminal Procedure] remains unaffected.⁴³

(2) An understanding may concern only the legal consequences [of the crime] that can be subject to the court's judgment and accompanying decrees,⁴⁴ other measures concerning the manner of proceeding in the relevant first instance proceedings,⁴⁵ as well as the

³⁸ See Thomas Weigend, *Der BGH vor der Herausforderung der Absprachenpraxis*, in 50 JAHRE BUNDESGERICHTSHOF: FESTGABE AUS DER WISSENSCHAFT IV 1011, 1022 (Claus Wilhelm Canaris et al eds., 2000).

³⁹ See Bundesgerichtshof [BGH - Federal Court of Justice], Case No. GSSt 1/04, 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 40, paras. 63–64 (Mar. 3, 2005).

⁴⁰ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvL 8/77, 49 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 89, paras. 76–79 (Aug. 8, 1978).

⁴¹ See DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/09 (Ger.), available at: <http://dip21.bundestag.de/dip21/btd/16/123/1612310.pdf> (explaining the Federal government's official reasons for the new legislation).

⁴² StPO § 257b.

⁴³ StPO § 244, para. 2. According to this section, the court is responsible for extending the trial to all facts and pieces of evidence necessary to establish the truth.

⁴⁴ That is, the sentence of the court including a decree suspending a prison sentence or permitting the defendant to pay a fine in installments.

⁴⁵ This could include dismissal of one or more factually separate crimes by the court.

procedural conduct of the participants [in the proceedings].⁴⁶ A confession should be part of any understanding. Neither the verdict⁴⁷ nor any measures of rehabilitation and security⁴⁸ can be subject to an understanding.

(3) The court announces what contents an understanding could have. The court may indicate an upper and lower limit of the sentence, taking into account in its discretion all circumstances of the case as well as general sentencing considerations. The participants [of the proceedings] are given an opportunity to comment. An understanding becomes valid⁴⁹ when the defendant and the prosecutor's office agree with the court's proposal.

(4) An understanding is no longer binding upon the court when the court has overlooked legally or factually relevant circumstances or when such circumstances have newly arisen, and the court has therefore come to the conclusion that the proposed sentence range is no longer adequate to the crime or to the guilt. The same applies when the defendant's further conduct during the proceedings does not comport with the expectation on which the court had based its prognosis.⁵⁰ In that case, a confession made by the defendant cannot be used as evidence. The court shall immediately inform [the participants] of any deviation [from the understanding].

⁴⁶ According to the commentary of the Ministry of Justice, "conduct of the participants" refers to any motion or abstention from a motion, as well as to a confession made in court. See Gesetzentwurf, Mar. 18, 2009, DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 16/12310 at 13, *available at*: <http://dip21.bundestag.de/dip21/btd/16/123/1612310.pdf>.

⁴⁷ The understanding shall not concern the charges of which the defendant is to be convicted (e.g., if the facts indicate that the defendant committed a robbery, there cannot be an understanding that he be convicted only of simple larceny).

⁴⁸ See STRAFGESETZBUCH [StGP] [PENAL CODE], May 15, 1871, REICHSGESETZBLATT [RGL.] 127, as amended, §§ 63, 64 (including commitment to a psychiatric hospital or to an institution for alcoholics and drug addicts).

⁴⁹ As Subsection 4 indicates, an understanding that has been agreed upon is, in principle, binding upon the court.

⁵⁰ By "prognosis," the legislature probably means the proposed sentence range.

(5) The court shall inform the defendant of the conditions under which the court can, according to § 4, deviate from the proposed result as well as the consequences [of such a deviation].⁵¹

This legislation largely codifies the requirements established previously by the Federal Constitutional Court and the Federal Court of Justice. Section 257c StPO gives the court a central role in plea bargaining.⁵² The statute allows judges not only to initiate negotiations, but also to indicate the maximum and minimum sentence they would impose as part of the bargain. At the same time, the statute limits judges' bargaining discretion. First, the verdict is not to be subject to bargaining, thus prohibiting what Americans call "charge bargaining," i.e., the manipulation of the facts or law of the offense the defendant has allegedly committed. Second, in suggesting a sentence range, the court must take into account "all circumstances of the case as well as general sentencing considerations," which means that the sentence proposed must be proportional to the "true" guilt of the defendant (§ 257c(2) last sentence StPO). Third, § 257c(1) explicitly refers to § 244(2) StPO, which obliges the court to independently search for the truth. Judges may not simply rely on the facts presented by the parties, including the defendant's confession, but must independently assemble a sufficient factual basis for the judgment.

The legislature took great care to spell out the conditions under which an understanding becomes binding (namely, when the prosecutor and the defendant agree to the court's proposed sentenced range and any procedural steps demanded of the defendant) and under which the court can later shed the strictures of the deal. Section 257c(4) gives judges great latitude for renouncing the agreement. For example, judges can withdraw the offer when the defendant's conduct does not fulfill their expectations or when they have overlooked a factual or legal (!) aspect of the case. From the perspective of the defendant, an understanding is therefore no more than a highly volatile sentence offer. In order to at least partly protect the defendant, the law declares his confession inadmissible as evidence if the court reneges the deal.⁵³ However, the defendant will confront at trial the same

⁵¹ The translation as well as our insertions and annotations are not official.

⁵² This is in contrast to rules in a number of other jurisdictions, such as Italy and the United States, where judges are generally prohibited from participating in plea negotiations, and negotiations are conducted exclusively between the parties. See Maike Frommann, *Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?*, 5 HANSE L. REV. 197, 204 (2009); Jenia Iontcheva Turner & Thomas Weigend, *Negotiated Justice*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1375, 1403–04 (Göran Sluiter et al. eds., 2013).

⁵³ See StPO § 257c, para. 4, sentence 4 (according to the wording of this sentence, however, evidence derived from the defendant's confession is admissible); see also Carl-Friedrich Stuckenberg, § 257c Marginal Note 68, in 6/2 LÖWE/ROSENBERG: DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ (Volker Erb et al. eds., 26th ed. 2013); but see Petra Velten, § 257c Marginal Note 51, in 5 SYSTEMATISCHER KOMMENTAR STRAFPROZESSORDNUNG

judges who had participated in the failed negotiations. German law does not provide for recusal of judges in these circumstances, thus significantly reducing the practical value of excluding the defendant's confession from the evidence at trial.

Because an understanding is in reality anything but binding on the court, the statute explicitly requires the court to inform the accused about the preconditions and consequences of a rejection of the agreement.⁵⁴ The legislature wished to make certain that the defendant knows the possible consequences of entering into an agreement and—more importantly—of coming forward with a confession.

Even where an understanding has been reached and the court abides by it, the parties retain their right to appeal the judgment, and they cannot waive this right in advance.⁵⁵

D. Plea Bargaining in Practice

When the German Constitutional Court took up the cases challenging the constitutionality of the statute on negotiating judgments, it solicited an empirical study of the statute's operation. The study revealed a wide chasm between the law on the books and bargaining in practice.⁵⁶

The study found that in 2011, about 18% of criminal proceedings in local courts (*Amtsgericht*) and 23% of proceedings in district courts (*Landgericht*) were resolved through a negotiated judgment.⁵⁷ These percentages may seem low, but one needs to consider the fact that, especially in local courts, there are many uncontested “open-and-shut” cases where the defendant has made a confession at the police station and therefore has nothing to negotiate. Cases that are initially contested, by contrast, are to a large extent dealt with by understandings. But understandings in real life are more often than not concluded in ways that do not conform with the rules enshrined in § 257c StPO. In the survey, 59% of judges admitted that they concluded more than half of their negotiations “informally,” i.e., without complying with the requirements of § 257c StPO and without

(Jürgen Wolter ed., 4th ed. 2012) (convincingly arguing in favor of excluding derivative evidence for reasons of fairness).

⁵⁴ See StPO § 257c, para. 5.

⁵⁵ See StPO § 302, para. 1, sentence 2.

⁵⁶ The study was conducted in 2012 and surveyed 190 criminal court judges from the German state Nordrhein-Westfalen. Of these, 117 were judges in a local court (*Schöffengericht*), and seventy-three were presiding judges of a district court criminal chamber (*Strafkammer*). The study also surveyed sixty-eight prosecutors and seventy-six criminal defense attorneys. KARSTEN ALTENHAIN, FRANK DIETMEIER & MARKUS MAY, DIE PRAXIS DER ABSPRACHEN IN STRAFVERFAHREN 18–24 (2013).

⁵⁷ *Id.* at 31.

recording the negotiations in the trial protocol.⁵⁸ Even when “formal” negotiations are conducted, 30% of the judges fail to inform the defendant of the possibility that the court may withdraw from an agreement, as demanded by § 257c(5) StPO.⁵⁹

In a substantial percentage of cases, the judges used a defendant’s formal acceptance of the prosecutor’s factual allegations as the sole basis for finding the defendant guilty, contrary to the law’s demand of independently establishing the truth.⁶⁰ The study also found that the subject matter of bargains extended beyond that authorized in the Code. For example, many judges listed the contents of the charges (*Schuldspruch*) as a frequent subject of bargaining.⁶¹

A large portion of respondents declared that they tell defendants not only a possible sentence *range* (as required by law) but the actual sentence they would receive if they confessed, and sometimes also the sentence they could expect to receive after a contested trial.⁶² The so-called “sanction scissors” (*Sanktionsschere*), the difference between the sentence offered for a confession and the sentence predicted for a full trial, is normally not more than one-third.⁶³ But in some cases, it is evidently large enough to make defendants confess even though, at least from the perspective of their lawyers, they could not have been found guilty as charged.⁶⁴ Finally, sentences were seen as disproportionately low or disproportionately high by a significant number of respondents.⁶⁵

Earlier studies on compliance with the guidelines set out by the courts had found results similar to those reported by the 2012 study: Plea bargaining in practice regularly departed

⁵⁸ *Id.* at 36-37, 146-47. More than a quarter of the respondents said that they always concluded deals informally. *Id.*

⁵⁹ *Id.* at 144.

⁶⁰ *Id.* at 93. Whereas judges said that this had occurred in 38% of their cases, defense lawyers thought that the court had regarded a merely formal “confession” as sufficient in 68% of their cases. Similarly, 72% of the judges declared that they always or frequently check the credibility of the confession before passing judgment, while only 29% of defense lawyers thought that the judges did so. *Id.* at 99. The difference may be explained by the fact that many judges said that they check the accuracy of the defendant’s confession by comparing it with the contents of the prosecution file. *Id.* at 100.

⁶¹ *Id.* at 77-78.

⁶² *Id.* at 118, 123.

⁶³ *Id.* at 130-31.

⁶⁴ Fifty-five percent of the defense lawyers polled in the study said that there had been cases where the “sanction scissors” made the defendant confess although his lawyer was not convinced that the confession was accurate. Thirty-five percent of the lawyers said that this happened “frequently” or “sometimes.” *Id.* at 134.

⁶⁵ *Id.* at 111-13. Thirty-one percent of prosecutors said that they had accepted a sanction they deemed too mild, and 30% of defense lawyers said that their client had accepted a sentence that was too severe.

from the guidelines.⁶⁶ The 2012 study, however, showed that even a statute specifically designed to regulate judgment negotiations did not manage to achieve more than half-hearted compliance. Informal practices, it seems, had become too entrenched, and the actors' economic and other incentives for resolving cases through deals were too powerful to overcome. The study's dramatic results thus presented the Court with the difficult question of whether a statute that was constitutional on its face might be unconstitutional if it is regularly ignored in practice.

E. The 2013 Judgment of the Constitutional Court

The challenge to the constitutionality of the 2009 legislation came in the form of constitutional complaints (*Verfassungsbeschwerden*) by three persons who had separately been convicted on the basis of negotiated judgments and whose complaints the Constitutional Court had joined. Each of the complainants claimed that the criminal court had not adhered to the procedural framework established under § 257c StPO and that his conviction was therefore unconstitutional.⁶⁷

The Court concluded that the constitutional challenges to these particular judgments were well-founded, but rejected the facial challenge to the legislation. It held that the statutory provisions were—"as of now"—constitutional. If strictly followed, these provisions ensured that negotiated judgments would comply with the constitutional requirements of a fair trial and the guilt principle. Faced with the findings of widespread non-compliance with the

⁶⁶ See, e.g., KARSTEN ALTENHAIN ET AL., *DIE PRAXIS DER ABSPRACHEN IN WIRTSCHAFTSSTRAFVERFAHREN* (2007); Raimund Hassemer & Gabriele Hippler, *Informelle Absprachen in der Praxis des deutschen Strafverfahrens*, 8 STRAFVERTEIDIGER [SVT] 360 (1986); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 217–22 (2006).

⁶⁷ The first two complainants argued that the trial court had violated the Constitution by failing to inform them that the court is free to deviate from the negotiated sentence if it concludes that it has overlooked significant legal or factual circumstances bearing on the defendant's culpability (§ 257c (5)). See *Judgment of Mar. 19, 2013* at para. 31; see also StPO § 257c, para. 5. Although the trial court did not ultimately deviate from the promised sentence, the Constitutional Court held that the failure to give the defendants the StPO §257c(5) warning violated their right to a fair trial and their privilege against self-incrimination, and remanded the case to the appellate court for a determination whether this prejudiced the defendants. See *Judgment of Mar. 19, 2013* at para. 124.

The third complainant argued that the trial court violated the Constitution in two ways: (1) By failing to independently verify the defendant's admission to the facts in the indictment; and (2) by agreeing, as part of an understanding, to treat the defendant's crime as a minor form of robbery. *Id.* para. 34. This allowed the court to reduce the sentence from four years to two years and also to suspend its execution, giving the defendant a significant benefit for his cooperation. The Constitutional Court agreed that the verdict violated the guilt principle because the trial court had not adequately examined the factual basis of the confession before sentencing the defendant. The Court further held that the understanding on which the verdict rested violated both the privilege against self-incrimination and the guilt principle because it offered the defendant an excessive sentence reduction in exchange for his confession. The size of the sentence reduction created the risk of undermining the voluntariness of the confession and producing a sentence that was not proportionate to the defendant's culpability. *Id.* para. 128.

statutory provisions, however, the Court also held that the legislature must continue to monitor their effectiveness. If systemic violations persist, the legislature must amend the provisions and, if necessary, ban judgment negotiations altogether.

The complaints offered the Constitutional Court the opportunity to review the constitutionality of judgment negotiations a quarter century after its first decision on the matter and with much better empirical data on the operation of the practice. Although the Court's 2013 opinion is more thorough and extensive, and contains a lengthy laundry list of constitutional principles presumably applicable to the case at hand, the Court still failed to engage deeply with some of the fundamental constitutional questions raised by plea bargaining: Can the courts' practical abandonment of their duty to inquire thoroughly into the facts be squared with the idea of a criminal process based on the rule of law? Does the promise of a sentence discount (the size of which remains unrestricted by statute) in exchange for the defendant's confession inherently violate the principle of guilt? More fundamentally, does the willingness to trade proportionate sentencing and a full examination of the facts for a waiver of the defendant's trial rights result in a "barter with justice," which the Court had held unconstitutional in 1987? The Court did not address these questions in its judgment and therefore implicitly accepted the argument that a properly regulated system of negotiated judgments is not inherently at odds with core constitutional principles.

The decision focuses on formal rules that the Court takes to be the central pillars of the regulatory scheme: Transparency, publicity, and a full documentation of negotiated proceedings.⁶⁸ In order to comply with the constitutional fair trial principle, the trial court must follow all the procedural requirements listed in § 257c StPO and related provisions: The presiding judge must publicly announce and document any discussions about the sentence before or during trial;⁶⁹ the court must document the presence and even the absence of any such discussions to ensure that no "informal deals" are taking place;⁷⁰ any concluded agreement must be mentioned in the written judgment;⁷¹ the defendant must be warned about the possibility that the court may deviate from the agreement if new circumstances arise;⁷² and it is impermissible to waive the right to appeal in advance or even right after the judgment has been announced.⁷³ In an unusual effort to overrule settled case law on appellate remedies, the Court further holds that a failure to follow the

⁶⁸ See *Judgment of Mar. 19, 2013* at para. 67.

⁶⁹ See StPO § 243, para. 4.

⁷⁰ See StPO § 273, para. 1a.

⁷¹ See StPO § 267, para. 3, sentence 5.

⁷² See StPO § 257c, para. 5.

⁷³ See StPO § 302, para. 1, sentence 2.

requirements of § 257c StPO must normally be presumed to have affected the judgment,⁷⁴ which leads to a reversal of the judgment on appeal.⁷⁵ The constitutionality of the legislation, in the Court's opinion, rests on the effectiveness of these formal requirements; at least for now, the Court finds them adequate.

The Court goes on to sharply criticize any attempts to circumvent the statutory regulations through "unofficial" deals.⁷⁶ It specifically addresses the so-called package deals, as part of which the prosecution offers to dismiss charges in other proceedings (including against other defendants) in exchange for the defendant's confession.⁷⁷

The Court ultimately entrusts prosecutors with the principal responsibility for enforcing the constitutional requirements. As "guardians of the law," prosecutors must refuse to take part in negotiations that do not comply with statutory requirements, and they must appeal those plea agreements that are concluded in violation of the statute (presumably despite the prosecutors' efforts).⁷⁸

In a puzzling twist, the Court also requires the legislature to continually monitor the development of judgment negotiations and the effectiveness of the statutory provisions. If, over time, the legislature determines that these provisions are inadequate to ensure that negotiations comply with constitutional principles, then the legislature must revise them, and if necessary, consider banning judgment negotiations altogether.⁷⁹ The Court understands that many attorneys, prosecutors, and courts regard the legislation as overly elaborate and impractical and therefore refuse to follow it. It is not clear, however, how the legislature could effectively resolve this problem when the very organs of justice that are supposed to enforce the legislation are the ones defying it. The Court suggests that it might declare the law unconstitutional if noncompliance persists, on the grounds that the law suffers from a structural defect. But it is difficult to find a "structural" defect in the law on negotiated judgments—and it is even more difficult to see how the legislature should amend the law except by deferring completely to the wishes of practitioners to be given

⁷⁴ *Judgment of Mar. 19, 2013* at para. 97.

⁷⁵ According to StPO § 337, a judgment must be reversed if it has been based on a procedural fault.

⁷⁶ *Judgment of Mar. 19, 2013* at paras. 76–78. The Court even indicates that judges who put on record an absence of negotiations where such negotiations indeed took place behind closed doors would commit the criminal offense of falsifying official records. *Id.* para. 78.

⁷⁷ *Id.* para. 79. Although StPO § 257c (2), sentence 1, limits the contents of bargains to "acts concerning the current proceedings," prosecutors also have authority to negotiate with suspects and their lawyers, and to dismiss cases on the basis of such negotiations. *See* StPO § 160a.

⁷⁸ *Judgment of Mar. 19, 2013* at para. 93.

⁷⁹ *See id.* para. 121.

carte blanche for bargaining at their convenience. But perhaps the Court was simply trying to ensure that its decision is not misinterpreted as a license to negotiate at will and to ignore the law. By suggesting that it may still declare the entire negotiating system unconstitutional, the Court may be attempting to put pressure on the participants to comply. But whatever its effectiveness as a psychological mechanism, the “conditional approval” of the legislation cannot, as a legal matter, work in the manner imagined by the Court. In spite of its effort to put the ball back in the legislature’s court, it will be the Federal Constitutional Court that will have to face the arduous task of shaping the law by dealing with individual constitutional challenges.

F. An Assessment of the Judgment of the Federal Constitutional Court

Although there are fundamental flaws in the Court’s approach to the problems of plea bargaining, the judgment makes an important contribution to the development of the law in this area.

First, the Court emphasizes the obligation of criminal court judges to seek the truth, and it clarifies that this duty is constitutionally mandated in both contested and negotiated proceedings. The Court grounds this obligation not in the right to a fair trial—where one might have expected it—but rather in the guilt principle: “The duty to thoroughly investigate the substantive truth is an indispensable requirement for the realization of the guilt principle and is not at the disposal of the legislature.”⁸⁰ The Court does not elaborate further on the connection between the guilt principle and the search for truth. Presumably, under a substantive understanding of the guilt principle, only the “true” guilt of the defendant can legitimize the imposition of punishment by the state. Whatever the underlying justification, the Court unequivocally rejects the idea that the verdict in a criminal case can be legitimized by the mere consensus of the participants rather than through an independent investigation into the facts of the case.⁸¹

The Court also notes the practical consequences that flow from this principle: A mere formal admission of guilt is never sufficient to meet the court’s obligation to investigate the truth.⁸² Even a detailed confession delivered in open court does not necessarily suffice. Judges must independently examine the factual basis for the confession, because—as the Court rightly acknowledges—the promise of a sentence reduction that prompts the confession may in some cases induce a defendant to give a (partly) false confession.⁸³ The Court further clarifies that judges may not fulfill their duty to seek the truth by just

⁸⁰ See *id.* para. 104.

⁸¹ See *id.* para. 105.

⁸² See *id.* para. 70.

⁸³ See *id.* para. 110.

informally comparing the confession with the contents of the prosecutor's investigative file.⁸⁴ In the same breath, however, the Court makes a practical concession and allows judges to verify confessions through two procedural quick fixes—*Selbstleseverfahren* and *Vorhalt*. The practice of *Selbstleseverfahren*⁸⁵—literally translated, “read-it-yourself process”—allows judges to read documents on their own in private, before or during the trial; when judges pledge that they have done so, the documents in question are deemed to have been introduced as evidence at the trial. The Court suggests that this procedure can be applied to the whole prosecution file or parts of it. *Vorhalt*, on the other hand, permits the presiding judge, when questioning the defendant in open court, to confront him with a previous statement recorded in the investigative file; upon the defendant's confirmation that the statement is correct, the prior confession becomes trial evidence.

The Court believes that it has significantly narrowed the practical usefulness of negotiated judgments by establishing these technical requirements.⁸⁶ It remains to be seen whether this is indeed the case. The need to confirm the veracity of the confession does not pose a serious obstacle to a “quick” verdict when corroboration requires nothing more than the technically correct introduction of the prosecution file as trial evidence.

Second, the Court emphasizes the importance of the guilt principle. But the Court focuses on the *procedural* implications of the principle, while it devotes little attention to the problem of the *substantive* proportionality of a negotiated sentence. In particular, the Court fails to address the question whether and to what extent the defendant's procedural cooperation can legitimately provide grounds for a sentence discount. The only indication of the constitutional limits on such discounts comes from the Court's ruling on the case brought by one of the three petitioners, who had been convicted on two counts of aggravated robbery. The presiding judge had offered to sentence him to two years imprisonment and to suspend the sentence if he confessed. The judge at the same time indicated that the defendant was likely to receive four years of imprisonment without suspension in the absence of a confession. The Constitutional Court found this sentence differential unjustifiable and therefore reversed the judgment.⁸⁷ But the Court did not rest the decision to vacate the verdict on a violation of the principle that the sentence must reflect the offender's guilt; instead, it found that the stark difference between the sentence options undermined the voluntariness of the defendant's confession. This leaves the substantive dimension of the guilt principle in need of further clarification.

⁸⁴ Such a superficial review of the confession was deemed sufficient by the Federal Supreme Court. See BGH, Case No. GSSt 1/04 at 49.

⁸⁵ See StPO § 249, para. 2.

⁸⁶ *Judgment of Mar. 19, 2013* at para. 72. For a similar assessment, see Werner Beulke & Hannah Stoffer, *Bewährung für den Deal?*, 68 JURISTENZEITUNG [JZ] 662, 665 (2013).

⁸⁷ *Judgment of Mar. 19, 2013* at para. 130.

The positive aspects of the judgment are, however, outweighed by its flaws. The Court's bureaucratic solution does not solve the fundamental problems of plea bargaining and ultimately helps no one.

The decision arguably sets out more burdensome procedural requirements for negotiated judgments, but these hurdles can be overcome without much difficulty if all participants agree. The duty imposed on prosecutors to ensure that participants comply with all formal requirements is not likely to be an effective safeguard, because prosecutors themselves have a strong interest in the conclusion of a sentence bargain.

Defendants still remain subject to the pressures of the *Sanktionsschere* as long as the penalty the judge "predicts" in case of a full trial is not clearly disproportionate. The Court did not offer any quantitative or qualitative guidelines that could aid lower courts and practitioners in determining what discounts might be disproportionate in individual cases. It is possible that judges will become more cautious and will refrain from telling the defendant what sentence might follow in the event of a contested trial. But this would place even greater pressure on defendants, who now may be told in vague but intimidating terms that they will not like the sentence they are to receive if they refuse to confess. Neither the legislature nor the Court considered the problem that a defendant who proceeds to trial after an agreement has not been achieved or subsequently has fallen apart faces the same trial judge who had actively conducted the failed negotiations.⁸⁸

Neither the legislation nor the Court's judgment addressed the marginal position of victims in negotiated cases. If a victim cannot or will not participate at the trial as a *Nebenkläger* (supplementary prosecutor),⁸⁹ he or she has no right to participate in or otherwise influence the judgment negotiations. Under § 257c StPO, the position of *Nebenkläger* is somewhat more advantageous, because they—as formal participants in the proceedings—must be heard and be given an opportunity to express their views about the proposed bargain. Even *Nebenkläger*, however, have no right to veto a proposed judgment accepted by the prosecution and the defense. Such a right would indeed go too far, as sentencing

⁸⁸ Arguably, the right to an impartial judge—guaranteed under both German constitutional law and the European Convention on Human Rights—means that the defendant must have access to a judge who has not yet formed an opinion on the defendant's guilt. See *De Cubber v. Belgium*, ECHR App. No. 9186/80, 1984 Eur. Ct. H.R. 14, para. 29 (finding that a Belgian investigating judge cannot later be the trial judge in the same case); *Hauschildt v. Denmark*, ECHR App. No. 10486/83, 1989 Eur. Ct. H.R. 7, paras. 50–52 (finding that a judge participating in pre-trial proceedings cannot be the trial judge when he had made decisions based on a "particularly confirmed suspicion" against the suspect before trial); but see *Saraiva de Carvalho v. Portugal*, ECHR App. No. 15651/89, 286-B Eur. Ct. H.R. (ser. A) paras. 37–39 (1994) (finding that a judge making preliminary decisions before trial can be the trial judge in the same case).

⁸⁹ According to StPO §§ 395–402, victims of certain crimes against the person have the right to join the public prosecution as supplementary prosecutors, which gives them the right to participate at the trial in much the same way as the prosecutor.

decisions should not—and even in ordinary proceedings do not—depend on the approval of the victim.⁹⁰ Nonetheless, the victim's position in negotiated cases appears quite weak when one considers that this process ultimately serves to replace the trial, in which victims are to receive recognition and a measure of redress.

Overall, the Constitutional Court appears to have missed the (perhaps last) opportunity to fundamentally review the regime on negotiated judgments from a constitutional standpoint. The Court made a great effort to ensure that the label, the cork, and the bottle are up to standard; but it failed to appreciate that the wine inside the bottle is undrinkable. It is regrettable that the Court did not do more than impose a few formal requirements on practitioners. The Court only briefly alluded to possible alternatives to negotiated judgments without exploring their advantages over present practices.⁹¹ One could have explored the option of devising more creative and more reliable solutions to disposing of criminal cases without trial. The prosecution file, which is a comprehensive—and presumably “neutral”⁹²—compilation of all the relevant evidence, might form the basis of a resolution without trial. If the defendant agrees that a judge imposes a verdict and sentence based on the prosecution file (possibly augmented by additional evidence taken by the judge) it would not be necessary to hold a full-fledged trial and yet the case resolution may have a fairly reliable factual basis.⁹³ A key element ensuring the reliability of this mechanism would be that the only concession offered to the defendant would be a legislatively defined, minor sentence reduction and that the outcome would be subject to ordinary appellate review. Another alternative might be an extended written (“penal order”) procedure, where the defense may ask for additional evidence to be taken. We concede that the details of such alternatives to negotiated justice were not on the Constitutional Court's agenda. Yet the judges could have indicated that they expect the legislature to think hard about alternatives to the defective ways in which the “consensual” process has been structured by § 257c StPO.

In spite of its length and verbosity, the judgment of the Federal Constitutional Court will remain largely ineffectual. The Court has not addressed the fundamental discrepancy between the subject matter of today's criminal cases and the criminal process stemming from the Nineteenth Century. Although the Court has placed the legislation “on probation,” the German legislature will find little incentive in the Court's judgment to amend the less-than-perfect provisions introduced in 2009. The Federal Court of Justice can be expected to continue its case-by-case approach, with a strong slant toward the

⁹⁰ See StPO § 400, paragraph 1, which accords *Nebenkläger* the right to appeal an acquittal but no right to file an appeal in order to have a more severe sentence imposed upon a convicted defendant.

⁹¹ *Judgment of Mar. 19, 2013* at para. 104.

⁹² According to StPO § 160, paragraph 2, the prosecutor shall collect both incriminating and exonerating evidence.

⁹³ A similar solution exists in Italy. See Arts. 438–42 Codice di procedura penale [C.p.p.] (It.).

practicability of the legislative model.⁹⁴ The lower courts are likely to continue with their flexible strategy: Fulfill the statutory requirements where they are not too burdensome, and circumvent the law where “necessary” by concluding unenforceable but practically binding “Gentlemen’s Agreements” outside the law. In that respect, the Federal Constitutional Court’s insistence on abiding by formal rules may well backfire to the detriment of defendants, who have no legal claim to enforce informal “deals” made by their lawyers in the backroom.⁹⁵

G. A Comparative Perspective

Our analysis of the German Constitutional Court’s decision has highlighted some of the challenges of effectively restraining and controlling negotiations on criminal judgments. Despite the shortcomings of its judgment, the German Federal Constitutional Court deserves praise for its willingness to impose constitutional restraints on the practice. The virtues of the German approach to plea bargaining appear more clearly when it is compared with the U.S. Supreme Court’s hands-off approach to similar proceedings that have long been characteristic features of the U.S. criminal process.

Like the German Constitution, the U.S. Constitution has no specific provisions addressing plea bargaining. But in contrast to the German Constitutional Court, the U.S. Supreme Court has not inferred any meaningful constraints on plea bargaining from broader constitutional principles such as the privilege against self-incrimination or the right to due process.⁹⁶ Instead, the Supreme Court has read these provisions narrowly in the context of plea bargaining. It has held that few governmental actions short of physical or mental coercion render a guilty plea involuntary.⁹⁷ In the Court’s view, the mere possibility that the defendant would receive a much more severe penalty upon conviction after a trial does not invalidate a guilty plea.⁹⁸ Yet, as numerous commentators have noted, excessive plea discounts pose the danger that innocent defendants may plead guilty in an attempt to

⁹⁴ The first judgments subsequent to the verdict of the Federal Constitutional Court demonstrate that the Federal Court of Justice is willing to make use of the small loopholes left by the Constitutional Court. See BGH, Case No. X ZR 130/12, Sept. 3, 2013, 2013 STRAFVERTEIDIGER [StV] 740 (2013) (failing by the trial court to document in the trial record whether negotiations took place is not reversible error).

⁹⁵ For a similar assessment, see Christoph Knauer, *Die Entscheidung des BVerfG zur strafprozessualen Verständigung*, 2013 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 433, 436 (2013).

⁹⁶ For arguments that the United States Supreme Court should infer limits on plea bargaining from the United States Constitution, see, for example, Alschuler, *supra* note 15; Covey, *supra* note 15, at 595, 597, 599–600; Lippke, *supra* note 15.

⁹⁷ See Brady, 397 U.S. at 753–55 (finding that if competent counsel is present, a plea deal is reached after the defendant’s codefendant, and the codefendant determines to plead guilty and is available to testify against the defendant, then a guilty plea by the defendant is not offered involuntarily).

⁹⁸ *Id.* at 755.

avoid a potentially devastating penalty, unduly penalize those who choose to go to trial, and hamper society's interest in proportionate punishment.⁹⁹ In this respect, the German Constitutional Court's ruling that excessive discounts violate the guilt principle and the privilege against self-incrimination offers a more promising approach to regulating one of the most problematic aspects of plea bargaining.

In contrast to the German Constitutional Court, the U.S. Supreme Court has also not attempted to restrain charge bargains. In the United States, charging decisions fall within the province of prosecutors, and the principle of separation of powers has been held to prevent judges from interfering with those decisions.¹⁰⁰ Unlike in Germany, no principle of legality constrains the ability of prosecutors to reduce or dismiss charges in order to induce a defendant to plead guilty.¹⁰¹ Furthermore, the U.S. Supreme Court has held that no constitutional violation occurs when prosecutors threaten defendants with more serious charges in order to obtain a guilty plea; as long as the more serious charges are supported by probable cause, such tactics are constitutionally permissible.¹⁰² The lack of restraints on charge bargaining exacerbates the problem of excessive plea discounts;¹⁰³ more significantly, it leaves the discretion to grant or withhold such discounts entirely in the hands of prosecutors, without any meaningful judicial supervision.

Unlike the German Constitutional Court, the U.S. Supreme Court has also not taken any serious measures to promote the search for truth during plea bargaining. The U.S. Supreme Court has failed to give substance to the factual basis requirement for guilty pleas and has accordingly allowed parties to engage in fact bargaining at will.¹⁰⁴ It has allowed lower courts to accept guilty pleas even when defendants profess their innocence—a

⁹⁹ See, e.g., Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 678–81 (2013); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034, 1047–49 (2006); Russell Covey, *Fixed Justice: Reforming Plea Bargaining With Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1281–1285 (2008); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2297–2307 (2006).

¹⁰⁰ See, e.g., *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–81 (2d Cir. 1973).

¹⁰¹ The German principle of legality—or mandatory prosecution—demands that prosecutors file charges where sufficient evidence exists. See StPO § 170, para. 1. This principle applies in practice to serious felonies.

¹⁰² See *Bordenkircher v. Hayes*, 434 U.S. 357, 362–65 (1978). “Charge bargaining” plays a much greater role in the U.S. than in Germany because U.S. courts generally cannot convict a defendant of charges other than those filed by the prosecutor. In Germany, by contrast, the trial court may convict the defendant of lesser or more serious crimes than those charged, as long as the court sticks to the facts underlying the indictment and gives the defendant proper warning. See StPO § 265.

¹⁰³ See, e.g., Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1948–50 (2006).

¹⁰⁴ Turner, *supra* note 66, at 212–23.

practice that remains incomprehensible to German courts and commentators.¹⁰⁵ And while German judges are at least required to consult a thorough investigative file to check the accuracy of a confession, American judges rarely go beyond reviewing the indictment and the defendant's sparse statements at the plea colloquy confirming the facts alleged in the indictment.¹⁰⁶ Whether these practices fully comport with the requirement that guilt be proven beyond a reasonable doubt remains an open question.¹⁰⁷

The U.S. Supreme Court has also held that the prosecution's failure to disclose certain evidence favorable to the defendant does not render a guilty plea uninformed.¹⁰⁸ German defense attorneys, by contrast, have access to the complete investigative file, which contains both inculpatory and exculpatory evidence gathered by the police and prosecution, before they negotiate a judgment. And whereas American courts need only give minimal notice of the meaning of the right to counsel before defendants are allowed to waive that right at a plea hearing,¹⁰⁹ German defendants facing a sentence of imprisonment beyond a few months normally must have counsel after indictment.¹¹⁰

¹⁰⁵ See *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (finding that equivocal guilty pleas are acceptable when there is strong factual evidence supporting guilt). For a German reaction, see Andreas Ransiek, *Zur Urteilsabsprache im Strafprozess: ein amerikanischer Fall*, 2008 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 116 (2008).

¹⁰⁶ Turner, *supra* note 66, at 212–23.

¹⁰⁷ See, e.g., Lippke, *supra* note 15, at 720–21.

¹⁰⁸ See *Ruiz v. United States*, 536 U.S. 622 (2002) (holding that a guilty plea may be informed even when the prosecution has failed to disclose evidence that serves to impeach the credibility of prosecution witnesses).

¹⁰⁹ See *Iowa v. Tovar*, 541 U.S. 77 (2004). In this case, the U.S. Supreme Court held that the court must inform the defendant “of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea” but does not need to:

(1) advise the defendant that “waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked”; and (2) “admonis[h]” the defendant “that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty” . . .

Id. at 81 (quoting *State v. Tovar*, 656 N.W.2d 112, 120–21 (Iowa 2003)).

¹¹⁰ According to StPO § 140, a defendant must be represented (or, in German understanding, “assisted”) by counsel in several situations: If he has been charged with a serious crime with a mandatory minimum of one year imprisonment (*Verbrechen*); if he is held in pretrial detention; if he is for personal reasons unable to properly conduct his own defense; or if he is faced with serious or complicated charges. If a defendant faces a reasonable risk of being sentenced to imprisonment for one year or more, German courts normally deem the charges “serious” and appoint counsel. See LUTZ MEYER-GÖßNER, STRAFPROZESSORDNUNG KOMMENTAR § 140 marginal n. 23 (56th ed. 2013). In the cases covered by StPO § 140, the defendant cannot waive the right to counsel (*notwendige Verteidigung* or “necessary defense counsel”).

These safeguards—the mandatory participation of counsel in plea bargaining and the full disclosure of evidence before negotiation—help enhance the accuracy and fairness of negotiated judgments in Germany.

Finally, the German Constitutional Court has done more to ensure the transparency and the reviewability of negotiated judgments. The German Court has emphasized the importance of the statutory requirement that appeals waivers not be made part of a negotiated judgment.¹¹¹ In the United States, by contrast, defendants are able to waive their right to appeal, precluding any meaningful review of plea bargains.¹¹² Likewise, while the German Constitutional Court has required that the content and outcome of any negotiations be placed on the record, the U.S. Supreme Court has not demanded such transparency. As a result, plea negotiations remain opaque and largely immune to review in most U.S. jurisdictions.¹¹³

A few recent decisions by the U.S. Supreme Court might be a sign that the Court is reconsidering its hands-off approach to plea bargaining.¹¹⁴ In *Padilla v. Kentucky*,¹¹⁵ *Lafler v. Cooper*,¹¹⁶ and *Missouri v. Frye*,¹¹⁷ the Court affirmed that defendants are entitled to effective assistance of counsel during plea bargaining and broadly delineated certain duties of counsel in the process. The dissenting Justices in *Lafler* criticized these decisions as opening the door to the “constitutionalization” of plea bargaining.¹¹⁸ It is too early to know whether the Court will in fact choose to impose more meaningful constitutional limits on

¹¹¹ See StPO § 302, para. 1; cf. *Judgment of Mar. 19, 2013* at paras. 67, 76, 78, 94–95.

¹¹² See, e.g., *United States v. Toth*, 668 F.3d 374, 379 (6th Cir. 2012); *Keller v. U.S.*, 657 F.3d 675, 681–82 (7th Cir. 2011); see generally Nancy King & Michael O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J. 209 (2005).

¹¹³ A few states have begun enacting rules requiring that plea offers be placed on the record. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012) (discussing rules in Arizona and New Jersey requiring that plea offers be placed on the record).

¹¹⁴ See Covey, *supra* note 15, at 595, 597, 599–600; Lippke, *supra* note 15, at 709; Wesley MacNeil Oliver, *The Indirect Potential of Lafler and Frye*, 51 DUQ. L. REV. 633, 633–45 (2013); but see Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 678–81 (2013); Darryl K. Brown, *Lafler, Frye, and Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT. R. 131 (2012); Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process “Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice”?*, 51 DUQ. L. REV. 735, 757 (2013).

¹¹⁵ *Padilla v. Kentucky*, 559 U.S. 356, 366–375 (2010).

¹¹⁶ *Lafler v. Cooper*, 132 S. Ct. 1376, 1385–87 (2012).

¹¹⁷ *Missouri v. Frye*, 132 S. Ct. 1399, 1408–10 (2012).

¹¹⁸ *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting).

plea bargaining. If it does so, the judgment of the German Constitutional Court—and its practical impact on the ground—would be worth examining.¹¹⁹

Although Germany and the United States have distinct constitutional texts and traditions, some of the core values and principles underlying the German Constitutional Court's judgment on plea bargaining—the privilege against self-incrimination, due process, transparency, and truth-seeking—are also central to the American constitutional tradition, even if their interpretation and scope of application differ in many respects.¹²⁰ Likewise, some of the practical problems that stand in the way of effective constitutional regulation—mounting caseloads, increasing complexity of the proceedings, conflicts of interest among the participants—are present in both criminal justice systems. For all these reasons, the German Constitutional Court's decision offers a useful case study of the promise—but also the limits—of constitutional regulation of plea bargaining.

¹¹⁹ In *Laffer*, the dissent claimed that German law requires prosecutors to charge all prosecutable offenses, “which is typically incompatible with the practice of charge-bargaining,” and goes on to praise Germany for entertaining “an admirable belief that the law is the law, and those who break it should pay the penalty provided.” *Id.* at 1397. The dissenting Justices of the U.S. Supreme Court might have benefited from a more thorough and up-to-date analysis of how German courts have regulated plea bargaining.

¹²⁰ See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 915–17 (2006); Lippke, *supra* note 15. For a comparison of German and American constitutional principles applicable to plea bargaining, see, for example, GERSON TRÜG, *LÖSUNGSKONVERGENZEN TROTZ SYSTEMDIVERGENZEN IM DEUTSCHEN UND US-AMERIKANISCHEN STRAFVERFAHREN* 104–188 (2003) and Dominik Brodowski, *Die verfassungsrechtliche Legitimation des US-amerikanischen “Plea Bargaining”—Lehren für Verfahrensabsprachen nach § 257c StPO?*, 124 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 733 (2012) (recognizing some similar constitutional values, but also noting that the search for the objective truth is less important in the American constitutional tradition and that the principle of proportionate sentences is not a key constitutional value in the United States).